Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Promotion of Competitive Networks in Local Telecommunications Markets	)	WT Docket No. 99-217
	)	
Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Services	)	
	)	
Cellular Telecommunications Industry Association Petition for Rulemaking And Amendment of the Commission's Rules to Preempt State and Local Imposition of Discriminatory and/or Excessive Taxes and Assessments	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98

<u>COMMENTS OF GLOBAL CROSSING LTD.</u>

Global Crossing Ltd. ("Global Crossing"), by its undersigned counsel, hereby submits these comments in response to the Commission's Notice of Proposed Rulemaking in the above-captioned proceeding.[1]

[1] *In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets,* FCC 99-141, WT Docket No. 99-217, CC Docket No. 96-98 (rel. July 7, 1999).

INTRODUCTION

On July 7, 1999, the Commission released a Notice of Proposed Rulemaking ("NPRM") in the above-captioned docket seeking comments as to how best promote competitive networks in local telecommunications markets. To reach this goal, the Commission will "focus specifically on eliminating certain barriers to facilities-based competition," as the "most substantial benefits to consumers will be achieved through [this form of] competition." NPRM at ¶¶ 4-5.

The Commission has previously found that "[o]ne of the fundamental goals of the Telecommunications Act of 1996 is to promote innovation and investment by multiple market participants in order to stimulate competition for all services, including broadband communications services," and that such competition encompasses the deployment of "last mile" and backbone facilities for the provision of these services. *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Manner*, FCC 99-5, CC Docket No. 98-146 ¶ 1(rel. Feb. 2, 1999). Recognizing the importance of several necessary inputs to full facilities-based competition, the NPRM seeks comment as to the ability of competitive providers to gain access to buildings, rooftops and facilities in multiple tenant environments ("MTE").

Global Crossing has emerged as the world's first independent provider of global telecommunications facilities and services, utilizing a network of undersea digital fiber-optic cable systems and associated terrestrial backhaul capacity. Specifically, Global Crossing is building five U.S.-based, fiber-optic cable systems, plus terrestrial systems in Japan, Europe, South America and the United States. The Company believes it will be the first to offer its customers access to multiple destinations worldwide through "one-stop shopping."

Global Crossing's submarine cable systems have U.S. landings in Washington State, California, New York, Florida and St. Croix, U.S. Virgin Islands. In addition, through its US

Crossing subsidiary, Global Crossing is also constructing a terrestrial backhaul network from each of its cable stations to inland telehouses. Ultimately, these systems will be used to deploy competitive broadband facilities in all markets, including the MTE market, to meet the growing demand for bandwidth to handle Internet, data, video and voice transmissions.

As a new competitor in the telecommunications marketplace, Global Crossing believes that the Commission has correctly identified building access as a factor that can significantly affect both the pace and cost of competitive entry. Accordingly, Global Crossing strongly supports the Commission's efforts to eliminate unnecessary and unreasonable barriers imposed by building owners and incumbents on access to buildings and in-building facilities, which are critical inputs to the deployment of next generation telecommunications networks.

DISCUSSION

I. EXCLUSIVE CONTRACTUAL ARRANGEMENTS SHOULD BE PROHIBITED

The NPRM seeks comment as to several problems of access by competitive providers to buildings, rooftops and facilities in MTEs. Among other things, the Commission particularly seeks comment on whether it is "sound policy" to permit exclusive contracts between property owners and service providers, and "the extent to which, and under what circumstances, the ability to enter into exclusive contracts materially advances the ability of competitive carriers to serve customers in multiple tenant environments." NPRM at ¶¶ 47, 61. In Global Crossing's view, exclusive contracts between property owners and service providers generally favor incumbent providers to the detriment of new entrants and therefore should be prohibited.

A. Exclusive Contracts Are Contrary To The Public Interest As They Preclude Consumer Choice

"The Commission has a long history of concern that all customers have access to their choice of communications service providers in competitive markets." NPRM at ¶ 32. With this concern in mind, the Commission previously recognized that exclusive contracts are often anticompetitive because they "lock up" properties, preventing endusers from receiving the benefits of a competitive marketplace. *Inside Wiring Report and Order and Second FNPRM*, 13 FCC Rcd 3659 ¶ 203 (1997); *see also* NPRM at ¶ 61 ("an exclusive contract prevents carriers from competing to serve customers on the covered premises during the period that the contract is in effect."). In other words, exclusive contracts empower landlords to make the very choices that Congress intended to be in the hands of endusers when it passed the 1996 Act. Thus, rather than having an incentive to promote competition and consumer welfare as the surrogate for their tenants, building owners actually have an economic incentive to enter exclusive contracts, if by doing so they can obtain concessions from the incumbent in exchange for granting exclusivity. Moreover, because exclusivity leaves endusers with no recourse to choose an alternate provider, exclusive arrangements are tantamount to a full denial of competitive access and contrary to the public interest.

Some have argued that exclusive contracts are necessary to enable new entrants to recoup their investments and gain a toehold in the MTE market, thereby precluding incumbents from maintaining their monopoly position. First, even if this argument were true as a matter of theory, it does not apply as a matter of fact when it is the incumbents who generally take advantage of exclusive arrangements due to their historic relationship with building owners, and not the competitive entrants seeking to provide consumer choice. The Commission has already recognized in analogous circumstances that where a provider possesses a predominant share of the market and that provider seeks to enter into an exclusive arrangement, thus denying its competitors access, there is likely to be a "limiting effect on the development of competition in that market." *Time Warner Cable*, 9 FCC Rcd 3221 ¶ 37 (1994)(discussing exclusive programming distribution practices)("*Time Warner*"). In the MTE marketplace, exclusive contracts will certainly have a limiting effect, impeding what could otherwise be a competitive market and forestalling full facilities-based competition in the provision of all telecommunications services.

Furthermore, both Congress and the Commission have already determined that, even though there may be benefits of exclusivity in certain limited circumstances, the 1996 Act clearly places a higher value on new competitive entry than on the continuation of exclusive practices that impede this entry. *See Time Warner* at ¶ 32. Accordingly, the Commission should prohibit telecommunications providers from entering into exclusive contracts with building owners.[2]

B. The Commission Has Ample Authority To Prohibit Exclusive Contracts In The MTE Marketplace

The Commission has ample authority pursuant to Title II of the Communications Act, as amended, to prohibit telecommunications providers from entering into exclusive contracts with building owners. The Commission has historically regulated agreements entered into by carriers subject to its jurisdiction, even if such agreements involve entities that potentially fall outside the Commission's direct jurisdictional reach under Title II. *See Cable & Wireless PLC v. FCC*, 166 F.3d 1224 (D.C. Cir. 1999)(upholding FCC's authority to issue order prohibiting U.S. carriers from paying foreign carriers more than certain benchmark rates for termination services); *see also Radio Television S.A. de C.V. v. FCC*, 130 F.3d 1078, 1082 (D.C. Cir. 1997)(Commission does not exceed its authority simply because a regulatory action effects entities outside of its jurisdiction). Accordingly, there is no question that the Commission has plenary authority under Title II to prohibit exclusive arrangements between carriers and building owners that directly affect the deployment of telecommunications facilities and the provision of telecommunications services.

The Commission has also asked commenters to consider whether applying a rule prohibiting exclusive contracts between building owners and service providers in a manner that "abrogates existing contracts" would "raise constitutional concerns." NPRM at ¶ 61. The

[2] To the extent the Commission were to decide that exclusive arrangements should be allowed in certain circumstances to assist new entrants, it could adopt a rule generally prohibiting exclusive contracts between telecommunications providers and building owners and carve out an exception for new entrants if they demonstrate that such exclusivity would serve the public interest. *See* 47 C.F.R. § 76.1002 (allowing exclusive programming arrangements if public interest test is met).

Commission has broad authority to address this problem within the bounds of the relatively limited constitutional restrictions in this area.

The Commission's regulation in this area is subject to the "less searching standards imposed on economic legislation by the Due Process Clauses," even where it applies retroactively to existing contracts. *PBGC v. R.A. Gray & Co.*, 467 U.S. 717, 733 (1984). As the Supreme Court has repeatedly stated,

> It is by now well-established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way. *See, e.g., Ferguson v. Skrupa*, 372 U.S. 726 (1963); *Williamson v. Lee Optical Co.,* 348 U.S. 483, 487-88 (1955).
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> -- *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976).

A rule prohibiting exclusive contracts between building owners and telecommunications providers in order to allow endusers free choice of providers would directly further the policy and directives of the 1996 Act. It cannot plausibly be considered an arbitrary or irrational response to the legitimate interests the Commission seeks to further. It is thus well within the scope of constitutionally permissible regulation in this area. Indeed, in *FCC v. Florida Power Corp.*, 480 U.S. 245 (1987), the Supreme Court expressly upheld the Commission's power to regulate the terms of existing contracts by reducing contractually agreed rates that utilities could charge for pole attachments by 67-75%. Only in the most extreme circumstances, far beyond anything presented by the proposals the Commission is considering, has the Supreme Court suggested that agency economic regulations run afoul of the Constitution. *See, e.g., Eastern Enterprises v. Apfel*, 118 S. Ct. 2131, 2149-53 (1998)(plurality opinion)(noting that "Congress has considerable leeway to fashion economic legislation, including the power to effect contractual commitments between private parties;" legislation held unconstitutional where it imposed liability of $50-100 million on a single party for events occurring 35 years previously and liability was "substantially disproportionate" to the party's experience.).

II. IN-BUILDING HOUSE AND RISER CABLES SHOULD BE TREATED AS AN UNBUNDLED NETWORK ELEMENT

In its NPRM, the Commission also seeks comment on the potential treatment of in-building cable and wiring owned or controlled by an incumbent LEC as an unbundled network element under Section 251(c)(3), and whether such unbundled access to riser cable and wiring within MTEs is technically feasible. *See* NPRM at ¶ 51. Global Crossing urges the Commission to treat house and riser cables as an unbundled network element, noting that there are no significant technical barriers to affording such treatment.[3] By allowing competitors to take advantage of the ILEC's cabling, the Commission will provide competitors with additional opportunities to enter local markets on a national or regional scale at prices that reflect the incumbent's economies of scale and scope, thereby increasing facilities-based competition consistent with the mandate of the 1996 Act. *See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, FCC 96-325, CC Docket No. 96-98 ¶ 232 (rel. Aug. 8, 1996).

Access to house and riser cables enables a competitive provider to use its own loop between its switch and the building in which a customer is located, and to use the incumbent LEC's facilities from the basement of that building up to the customer premises.[4] A competitive

[3] Indeed, as the Commission recognizes, at least one state already requires the incumbent LEC to provide access to its house and riser cables as an unbundled network element, and has adopted not one but two different configurations as an appropriate form of connection. This demonstrates that connecting house and riser cables is relatively straightforward and that there is no question as to the technical feasibility of requiring these connections. *See* NPRM at ¶ 51, n. 121; *see also Deployment of Wireline Services Offering Advanced Telecommunications Capabilities*, 1999 FCC LEXIS 1327 ¶ 8 (March 31, 1999)(finding that a "collocation method used by one incumbent LEC or mandated by a state commission is presumptively technically feasible for any other incumbent LEC.").

[4] The availability of house and riser cables at reasonable prices, and on reasonable terms and conditions, can also place competitive pressure on the pricing of the incumbent's unbundled link service, which allows a competitive provider to use an ILEC's link running from the competitor's collocation cage all the way to the customer's premises. Among other things, this permits competitors to make efficient "buy or build" decisions.

provider will bring its own cabling into the basement of an MTE and cross-connect to the ILEC's facilities, which run to the network demarcation point for the enduser's service.[5]

As the Commission noted in its NPRM, several competitive providers have already explained that, "in many instances, it is difficult for them to provide service without access to these facilities." NPRM at ¶ 51 (citing Teligent and Winstar Section 706 comments). Global Crossing agrees that unbundled access to house and riser cables is "necessary" to ensure full facilities-based competition, and that failure to provide such access would "impair" the ability of new entrants to provide the services they seek to offer. *See* 47 U.S.C. § 251(d)(2); *see also AT&T Corp. v. Iowa Util. Bd.*, 119 S. Ct. 721, 734-36 (1999).

In addition, Global Crossing respectfully requests the Commission to adopt rules facilitating unbundled access to house and riser cables. These rules should include, among other things, a provision requiring incumbent LECs to provide competitive providers with a list of buildings in which they own house and riser cables. This detail cannot be overlooked as it is otherwise extremely difficult for competitive providers to determine who owns this wiring in any given building. Quite often, even the building owner has no idea who owns what wires located within its building. If a comprehensive list of ILEC in-building facilities is required, competitive providers will not need to waste significant time investigating whether it is the incumbent carrier or the building owner that it should be dealing with and can proceed immediately with interconnection negotiations.

Also, the Commission's rules need to address incumbent's claims that only its own personnel can perform the functions necessary to connect a competitive provider to an incumbent's house and riser cables. Rather competitive providers must be allowed to utilize their own qualified technicians to perform these tasks.

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[5] Typically, house and riser cables connect to an ILEC's cross-connect box located in the basement of a building.

One dimension of competition is speed of service. An efficient competitor seeking to gain new customers will seek to provide the highest quality of service and deliver it in the shortest possible time frame. For example, if an incumbent's standard wait for the installation of new service is five days, a competitive provider can offer its service in two days. Or, if an incumbent's standard wait for repair service is one day, a competitive provider can offer its repair service in three hours. However, this competitive offering cannot be made if the competitive provider is forced to rely on an incumbent's schedule and personnel. Moreover, if the incumbent's technician simply fails to show up at the expected time, there would be nothing the competitive provider could do but wait for another service dispatch, which may or may not take another several hours or even days. Allowing ILECs to mandate that only their technicians can perform the required connective functions necessarily slows this competitive response, leaving the competitive provider at the mercy of the incumbent.

It also cannot reasonably be argued that permitting a competitive provider's fully trained technician to connect a wire to an incumbent's wire poses any threat, real or otherwise, to the integrity or safety of the telephone network. To the contrary, the task is a simple one that can easily be performed by a qualified telecommunications technician.

Accordingly, competitive providers must have access to house and riser cables as an unbundled network element. In addition, to avoid unnecessary delay, inefficiency and added costs, competitive providers must be given a comprehensive list of buildings in which incumbent LECs own or control house and riser cables, and must be permitted to use their own qualified technicians to perform the necessary cross-connections.

CONCLUSION

For the foregoing reasons, Global Crossing respectfully requests that the Commission adopt rules precluding carriers from entering into exclusive contracts with building owners and designating in-building house and riser cables as unbundled network elements. Exclusive contracts between carriers and building owners only serve to further entrench incumbents, and substitute the interests of building owners for endusers, contrary to the mandates of the 1996 Act. The Commission has ample authority under the Communications Act to prohibit regulated carriers from entering such agreements, and should make clear that such exclusive arrangements have no legitimate role given current market circumstances. In a similar vein, access to house and riser cables by new entrants is critically important to their ability to compete with incumbents for customers in the MTE market. There are no technical barriers to competitor access to incumbent in-building facilities, and mandating access to these facilities is required to further the pro-competitive policies of Section 251 and the 1996 Act.

Respectfully submitted,

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